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Supreme Court, U.S.
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No. 87-1699

In The
Supreme Court of the United States
October Term, 1987

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND FOR SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

v.

DR. MARCIAL LEWIN AND HILLCREST BAPTIST HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM, OF HILLCREST BAPTIST HOSPITAL

Roy L. Barrett
of
Naman, Howell, Smith & Lee, P.C.
Texas Center
P. O. Box 1470
Waco, Texas 76703-1470
(817) 754-1421

Attorneys for Appellee
Hillcrest Baptist Hospital

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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POINT THREE 2

This appeal should be dismissed because the alleged federal question to be reviewed was not expressly passed on by the Texas state courts.

POINT FOUR 2

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No. 87-1699

In The
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GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND FOR SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

v.

DR. MARCIAL LEWIN AND HILLCREST BAPTIST HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM, OF HILLCREST BAPTIST HOSPITAL

Hillcrest Baptist Hospital, one of the appellees herein, respectfully submits this Motion to Dismiss, or in the Alternative to Affirm, the above styled and numbered appeal, and as grounds shows:

POINT ONE

This appeal should be dismissed because it does not present a substantial federal question.

POINT TWO

This appeal should be dismissed because the alleged federal question sought to be reviewed was not timely or properly raised in the state courts.

POINT THREE

This appeal should be dismissed because the alleged federal question to be reviewed was not expressly passed on by the Texas state courts.

POINT FOUR

This appeal should be dismissed because the judgment appealed from rests on an adequate non-federal basis.

POINT FIVE

The Court should affirm the judgment sought to be reviewed because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

———o———

FACT STATEMENT

In order to give the Court some factual background with which to review this case, appellee Hillcrest submits the following fact statement.

Suit was filed on November 4, 1983, in the 129th District Court of Harris County, Texas. (Tr. 10) It was transferred to McLennan County on change of venue, (Tr. 15) and received by the district clerk on or about May 2, 1984. As of February 1985, over nine months later,

plaintiff still had not paid the filing fee in order for the case to be docketed in McLennan County.

Hillcrest moved to dismiss without prejudice based on this failure to pay the filing fee. (Tr. 26) The trial court overruled the motion to dismiss, giving the plaintiff the opportunity to pay the filing fee, which was thereafter paid.

On May 28, 1985, defendant Hillcrest served on counsel for plaintiff a set of written interrogatories. (Tr. 40, 53) Under Rule 168, *Tex. R. Civ. P.*, answers were due on June 30, 1985. Nearly a month *after* the due date, on July 22, 1985, Penny Wymyczak, a legal assistant in the office of plaintiff's counsel, Benton Musslewhite, telephoned counsel for defendant Hillcrest and requested a second copy of the interrogatories. A second copy was mailed on July 24, 1985. (Tr. 55)

Over two months later, on September 27, neither answers to the interrogatories nor a motion for extension of time having been filed, Hillcrest filed a motion under Rule 215, *Tex. R. Civ. P.*, for sanctions against plaintiff for failing to answer interrogatories. (Tr. 49) A hearing on this motion was set for November 1, 1985.

On October 3, 1985, Ms. Wymyczak again telephoned the office of counsel for Hillcrest and requested a third copy of the interrogatories first mailed on May 28. On October 4, 1985, counsel for Hillcrest forwarded a third copy.

On October 22, counsel for Hillcrest received a telephone call from plaintiff's counsel's office requesting a

second copy of the Rule 215 motion which had been mailed on September 27.

On October 29, only three days prior to the hearing on defendant's motion, a representative from the office of plaintiff's counsel telephoned counsel for Hillcrest, advised that the answers to interrogatories were being sent by courier service, and requested that the November 1 hearing be cancelled due to a death in the family of plaintiff's counsel. The interrogatory responses subsequently arrived with a cover letter dated October 30.

Counsel for Hillcrest reviewed the answers and concluded that the answers to Interrogatories Nos. 9, 10, and 22 were incomplete and insufficient. In this medical malpractice suit these interrogatories were critical to Hillcrest's ability to prepare a defense. Interrogatory No. 9 requested the names of all doctors who had treated plaintiff's wife during the ten years prior to her death. Plaintiff responded that he was in the process of obtaining this information and would provide it. Question No. 10 asked for *the name* of every hospital in which plaintiff's wife was a patient. Plaintiff answered "for childbirth." Question No. 22 asked for specific facts which formed the basis of allegations of negligence against Hillcrest. Plaintiff responded, "Because of the negligent acts or omissions of the staff, our plaintiff's untimely death was caused." (Tr. 59, 60, 63)

On November 1, counsel for Hillcrest wrote to plaintiff's attorney agreeing to cancel the November 1 hearing but rescheduling it for November 22 due to the insufficient answers to Question Nos. 9, 10, and 22.

On November 21, 1985, *one day* prior to the scheduled hearing, Jane Hayes, in Mr. Musslewhite's office, telephoned counsel for Hillcrest and asked that the next day's hearing be cancelled because plaintiff's attorney was in Greece. Counsel for Hillcrest again accommodated counsel for plaintiff.

Plaintiff in his answers to interrogatories served on October 30 had stated that he would supplement his answer to Interrogatory No. 9 after he secured additional information. Seven months later, on May 23, 1986, having received no supplemental answers, counsel for Hillcrest wrote a letter to plaintiff's attorney, reviewing the previous efforts to schedule a hearing and advising that the hearing for sanctions was reset for June 13, 1986.

The hearing was held on June 13. Mr. Musslewhite did not attend. Instead he sent two attorneys, Susan Ashley and Jeff McElroy, who stated to the court that they were authorized to represent plaintiff. (Tr. 84) On this day a supplemental answer to Interrogatory No. 22, signed by counsel for plaintiff, was filed. (Tr. 81) At the hearing the attorney for Hillcrest, Roy L. Barrett, produced an affidavit signed by him outlining the procedural history of this case in support of the Rule 215 motion. Mr. Barrett stated that he would take the stand and testify to the contents of the affidavit if the lawyers representing plaintiff requested. Otherwise, with the court's permission, he would offer the affidavit into evidence as his direct testimony and make himself available for cross-examination. Ms. Ashley and Mr. McElroy both expressed no objection to this procedure and the affidavit was marked as an exhibit and introduced into evidence. The lawyers repre-

senting plaintiff declined the opportunity to cross-examine Mr. Barrett, and the court then excused him as a witness.

Following the hearing the trial court, on June 16, 1986, rendered a judgment of dismissal with prejudice. (Tr. 84) This judgment recites, in part:

> The Court, *having heard the evidence* and considered the pleadings, affidavit, motions for sanctions filed by both defendants, and having heard argument of counsel, finds that plaintiffs had due and proper notice from both defendants of said hearing, and further finds that plaintiffs have abused the discovery process, as set forth in the *Texas Rules of Civil Procedure*, by resisting proper discovery directed to plaintiffs herein as fully established by the record before the Court at said hearing, and the Court further finds that it should impose the sanction authorized by Rule 215 and strike all pleadings of plaintiffs herein, dismiss all plaintiffs' claims and causes of action herein with prejudice and render judgment that plaintiffs take nothing from defendants herein. (Emphasis added.)

On July 15, 1986, plaintiff filed a "Motion for New Trial with Respect to the Court's Order Dismissing Plaintiffs' Case Pursuant to Rule 215." (Tr. 86) On August 27, 1986, a lengthy evidentiary hearing was held on this motion. The trial court overruled plaintiff's motion in an order which is not in the record but which recited, in part:

> On the 27th day of August, 1986, after due and proper notice to all parties, came on for hearing plaintiffs' Motion for New Trial herein, and came plaintiffs, Gary Elliott, individually and as next friend of Shauna Marie Elliott, a minor, by their counsel of record, and came both defendants, Dr. Marcial Lewin and Hillcrest Baptist Medical Center, by their re-

> spective counsel of record, and the Court, after considering said Motion for New Trial, *hearing evidence and argument of counsel*, and considering the pleadings and other documents on file herein, was of the opinion that said Motion for New Trial should be in all things overruled. (Emphasis added.)

Appellant appealed from these two orders to the Tenth Court of Appeals at Waco, Texas. However, he failed to include in the appellate record a statement of facts of the evidence heard by the trial court at either of the two hearings.

The court of appeals affirmed the judgment on the ground that it did not have a complete record. Plaintiff made application to the Texas Supreme Court for writ of error seeking reversal of the lower courts' judgment. The supreme court refused to find any reversible error and refused the application for writ of error.

POINT ONE, RESTATED

This appeal should be dismissed because it does not present a substantial federal question.

POINT TWO, RESTATED

This appeal should be dismissed because the alleged federal question sought to be reviewed was not timely or properly raised in the state courts.

POINT THREE, RESTATED

This appeal should be dismissed because the alleged federal question to be reviewed was not expressly passed on by the Texas state courts.

POINT FOUR, RESTATED

This appeal should be dismissed because the judgment appealed from rests on an adequate non-federal basis.

ARGUMENT AND AUTHORITIES UNDER POINTS ONE, TWO, THREE AND FOUR

Jurisdiction of this appeal is based on 28 U.S.C. § 1257, which states in part:

> Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellants Elliott, et al, appeal from the Supreme Court of the State of Texas, "seek[ing] review of a decision of the Supreme Court of Texas affirming a dismissal of appellants' medical malpractice case with prejudice." (Jurisdictional Statement, pp. 1-2)

In order for the Court to have jurisdiction of this case it must affirmatively appear that (1) a substantial federal question was (2) properly presented to the highest state court and was (3) passed upon by that court and that (4) the decision of the federal question was necessary to the determination of the cause. *Durley v. Mayo*, 351 U.S. 277, 281, 76 S.Ct. 806, 100 L.Ed. 1178, 1183 (1955); *Webb v. Webb*, 451 U.S. 493, 496-97, 101 S. Ct. 1889, 68 L.Ed.2d 392, 397 (1981). The absence of each of these elements will be discussed below.

1. *Appeal Does Not Present Substantial Federal Question*

In order for this appeal to be within the jurisdiction of this Court it must present a "substantial federal question." *Great Northern Railway Company v. Alexander,* 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1917); *New Orleans Waterworks Company v. State of Louisiana,* 185 U.S. 336, 346, 22 S.Ct. 691, 46 L.Ed. 936, 942 (1901). No such question is presented by this appeal.

As shown by the fact statement above, the only question presented by this appeal is whether the failure of the appellant to provide a complete record of all proceedings in the trial court required the appellate courts to presume, in the absence of the evidence which was before the trial court, that the trial court properly exercised its discretion and that its actions were supported by the evidence before the court.

Clearly this is purely a question of state law. It is also clear that this principle of state law is well-established and consistently applied. See for example *Fenton v. Wade,* 303 S.W.2d 816, 818 (Tex. Civ. App.—Ft. Worth 1957, writ ref'd n.r.e.); *Arlington Bank & Trust v. Nowell Motors, Inc.,* 511 S.W.2d 415, 516 (Tex. Civ. App.—Ft. Worth 1974, n.w.h.); *Men's Warehouse v. Helms,* 682 S.W.2d 429, 430 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e., cert. den., 106 S.Ct 38); *McFadden v. Farmers and Merchants Bank of Long Beach,* 689 S.W.2d 330, 332 (Tex. App.—Ft. Worth 1985, n.w.h.); *Olivares v. Cauthorn,* 717 S.W.2d 431, 434 (Tex. App.—San Antonio 1986, writ dism'd.). There is nothing arbitrary about its application to this case.

When a case presents only a question of state law, and not a substantial federal question, this Court does not have jurisdiction under 28 U.S.C. § 1257. *New Orleans Waterworks Company v. Louisiana, supra,* 185 U.S. at 346. Therefore, since this appeal does not present a substantial federal question, it should be dismissed.

2. *Federal Question Not Timely or Properly Raised*

Rule 15.1(g) of the rules of this Court requires an appellant to specify in his jurisdictional statement the stage of the proceedings at which the questions sought to be reviewed were first raised, the method or manner of raising them, and the way in which they were passed upon by the state court. Appellants have failed to comply with this requirement. Appellants have failed to provide to this Court in the appendix copies of their briefs in the state courts so this Court can determine whether the alleged federal question was raised in the state courts. *Lynch v. People of the State of New York,* 293 U.S. 52, 54, 55 S.Ct. 16, 79 L.Ed. 191, 193 (1934).

In fact appellants did not raise any complaint in the trial court about the constitutionality of Rule 215 either as written or as applied. In Texas, matters not raised in the trial court will not be considered on appeal. *Pirtle v. Gregory,* 629 S.W.2d 919, 920 (Tex. 1982).

Unconstitutionality must be raised in the trial court in order to be considered on appeal. *United Postage Corporation v. Kammeyer,* 581 S.W.2d 716, 722 (Tex. Civ. App.—Dallas 1979, n.w.h.); *Babcock v. State,* 668 S.W.2d 857, 861 (Tex. App.—Austin 1984, writ ref'd n.r.e.); *Red-*

dix v. Eaton Corporation, 662 S.W.2d 720, 723 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

A point raised for the first time on appeal is not properly presented where the state's procedural rules require issues to be first raised in the trial court in order to be considered on appeal. *Louisville & Nashville Railroad Company v. Woodford*, 234 U.S. 46, 51, 34 S.Ct. 739, 58 L.Ed. 1202, 1208 (1913). Consequently any effort to raise the issue of unconstitutionality at any stage subsequent to the trial court would not serve to invoke this Court's jurisdiction.

Even though they had not presented the issue of unconstitutionality in the trial court, appellants included in their brief in the state court of appeals a point of error complaining of the alleged violation of their constitutional rights in the manner in which Rule 215 was applied to them. They did *not* complain that Rule 215 was unconstitutional as written.

Although the issue of unconstitutionality had not been raised in any manner in the trial court, and thereby preserved for appeal, the court of appeals did acknowledge that point in its opinion. The court resolved this issue on a nonfederal procedural ground, as follows, holding essentially that it could not reach the point due to an incomplete record.

> Without a statement of facts or findings of fact and conclusions of law, this court must presume that, under the circumstances, the trial court did not abuse its discretion and that it tailored the sanction to redress the prejudice to defendants. See Englander Co., Inc., 428 S.W.2d at 806-07. Point two is overruled.

Appellants did not include in their Motion for Rehearing in the court of appeals a point complaining of the unconstitutionality of Rule 215 either as written or as applied. The Texas Supreme Court has no jurisdiction to consider points included in an application for writ of error unless those points have been preserved in a motion for rehearing. *Wallace v. Scrogum*, 372 S.W.2d 941 (Tex. 1963); *East Texas Motor Freight Lines v. Loftis*, 148 Tex. 242, 223 S.W.2d 613, 616 (1949).

In their application for writ of error filed in the Texas Supreme Court appellants included a point complaining that the way Rule 215 was applied in this case violated their constitutional rights. Because no such point had been included in appellants' Motion for Rehearing in the court of appeals, the Supreme Court of Texas had no jurisdiction to consider this point.

This Court has held that if the state court fails to pass expressly upon the federal question, it will be presumed that the federal question was not properly presented in the state court, unless the complaining party can affirmatively show to the contrary. *Street v. State of New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed. 2d 572, 579 (1969). Since the Texas Supreme Court did not expressly pass on the alleged federal question it must be presumed that the question was not properly presented to that court by having been preserved in a motion for rehearing in the lower court.

Appellants have raised a new point in this Court, concerning the alleged unconstitutionality of Rule 215 *as written*. This point has not been presented in the state

court at any level. The question of the unconstitutionality of Rule 215 as written not having been properly presented to or ruled on by the state court, it is not properly before this Court and this Court has no jurisdiction to consider it. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 671, 96 S.Ct. 2358, 49 L.Ed.2d 132, 136 n. 3 (1976); *Cardinale v. State of Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1162, 22 L.Ed.2d 398, 400 (1969).

In summary, appellants did not raise the question of unconstitutionality in the trial court. They complained of the unconstitutionality of the *application* of Rule 215 to the facts in this case in the state court of appeals. Although this point had not been preserved, the court of appeals nevertheless disposed of this point on the procedural basis of the absence of a complete record. Appellants did not include unconstitutionality as a point in their Motion for Rehearing in the court of appeals. Appellants complained of the application of Rule 215 in the Texas Supreme Court but that court had no jurisdiction to consider the point. Appellants have raised a point complaining of the unconstitutionality of Rule 215 *as written* for the first time in this Court.

Clearly, appellants' complaints concerning the alleged unconstitutionality of Rule 215 as written and as applied in this case were not timely or properly raised in the state courts and this Court therefore has no jurisdiction under 28 U.S.C. § 1257 to consider these points, and this appeal should be dismissed.

3. *Federal Question Not Expressly Passed On By Texas State Court*

In order for a state court case to be reviewed in the United State Supreme Court, it must appear from the record that a federal question was decided by the highest state court. *Cardinale v. Louisiana, supra,* 394 U.S. at 438; *State of California v. Holladay,* 159 U.S. 415, 16 S.Ct. 53, 40 L.Ed. 202 (1895).

In this case the Texas Supreme Court did not decide the issue of unconstitutionality of Rule 215 as applied because, as shown above, the court had no jurisdiction to consider the point, there being no such point contained in appellants' Motion for Rehearing in the court of appeals. *Wallace v. Scrogum,* 372 S.W.2d at 943; *East Texas Motor Freight Lines v. Loftis, supra,* 223 S.W.2d at 616.

"Where the highest court in the state delivers no opinion and it appears that the judgment *might* have rested upon nonfederal grounds, this Court will not take jurisdiction to review the judgment." *Stembridge v. State of Georgia,* 343 U.S. 541, 547, 72 S.Ct. 834, 96 L.Ed. 1130, 1134 (1951); *Durley v. Mayo, supra,* 351 U.S. at 281.

In addition, the court of appeals was unable to reach, and did not expressly rule on, the question of unconstitutionality. The court held that due to the absence of a complete record it had to presume that the trial court acted within its discretion. In any event the court of appeals would have been unable to address this point on the merits, and would have acted improperly had it done so, because the issue was not raised in the trial court, and therefore not preserved for appeal. *United Postage Cor-*

poration v. Kammeyer, supra, 581 S.W.2d at 722; *Babcock v. State, supra,* 668 S.W.2d at 861.

Appellants' newly raised point concerning the unconstitutionality of Rule 215 *as written* has not been passed upon by any Texas state court because it was not presented to any Texas state court. Since this issue was neither raised in nor ruled on by any state court, it is not properly before this Court and this Court has no jurisdiction under 28 U.S.C. § 1257 to consider it. *Cardinale v. Louisiana, supra,* 394 U.S. at 438.

4. *Judgment Rests on Adequate Nonfederal Basis*

The Supreme Court will not entertain jurisdiction of an appeal where the state court judgment is based on a nonfederal ground. *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 129, 65 S.Ct. 1475, 89 L.Ed. 2092, 2100 (1944).

As discussed above, appellants' complaint of the unconstitutionality of Rule 215 *as written* has been raised for the first time in this Court. Therefore, it was not passed on by a state court, is not properly before this Court, and will not be discussed in this section of appellees' motion.

The Texas Supreme Court refused to find any error in the court of appeals' judgment. This refusal to find error could have been based on at least two state procedural grounds.

First, appellants did not include a point on unconstitutionality in their Motion for Rehearing in the court of appeals. This step was a prerequisite to the Texas Supreme Court having the power and authority to consider

the point. *Wallace v. Scrogum, supra,* 372 S.W.2d at 941; *East Texas Motor Freight Lines v. Loftis, supra,* 223 S.W.2d at 616.

Secondly, appellants failed to include in the record statements of fact from either of the two evidentiary hearings held in the trial court. The lack of a complete record of the proceedings below is an adequate nonfederal ground precluding review by this Court. *Hedgebeth v. State of North Carolina,* 334 U.S. 806, 807, 68 S.Ct. 1185, 92 L.Ed. 1739, 1740 (1948).

Either one of these two procedural grounds could have been the basis for the failure of the Texas Supreme Court to find any reversible error in the court of appeals' treatment of appellants' unconstitutionality claim. Since the judgment of the highest state court can be based on one of these nonfederal grounds this Court should decline to entertain this point.

The court of appeals' judgment was very clearly and expressly based on nonfederal grounds. The court held that without a statement of facts or findings of fact and conclusions of law, it must presume that the trial court's actions were proper.

It is a well-recognized and consistently applied principle in Texas that when an appealing party fails to bring to the appellate court a complete record, the court must presume that the omitted portions of the record support the judgment. *The Englander Company, Inc. v. Kennedy,* 428 S.W.2d 806, 807 (Tex. 1968). All presumptions as to the evidence must be in support of the judgment when the appellant chooses not to file a statement of facts. *Robinson*

Electric Supply Company v. Cadillac Cable Corporation, 706 S.W.2d 130, 133 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

The failure of a party to provide the state court with a full record is an adequate nonfederal ground for decision. *Hedgebeth v. North Carolina, supra,* 334 U.S. at 807. Consequently, this Court should decline to consider this appeal.

POINT FIVE, RESTATED

The Court should affirm the judgment sought to be reviewed because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

———o———

ARGUMENT AND AUTHORITIES UNDER POINT FIVE

The Court should affirm the judgment sought to be reviewed because the questions presented by this appeal are unsubstantial and so wanting in substance as not to merit the attention of this Court.

This case involves the imposition of discovery sanctions and, specifically, dismissal with prejudice of appellants' case as a result of a lengthy and unexplained failure to comply fully with reasonable discovery requests. Appellants complain that the trial court's action in dismissing the case under Rule 215 violated their constitutional rights to due process.

The two orders of the trial court about which appellants complain, the judgment and the order overruling

appellants' Motion for New Trial, both recite that the trial court heard and considered evidence. Appellants failed to provide to the state appellate courts any record of the evidence heard at either of the two hearings. The court of appeals' opinion was based squarely on the failure of appellants to bring up a complete record of all the proceedings below. The Texas Supreme Court found no error in this ruling.

Appellants now ask this Court to hold that the manner of application of Rule 215 in this case violated their constitutional rights to due process when appellants have failed through the absence of a complete record to show exactly what process they were afforded.

The court of appeals found expressly that appellants were given proper notice of the sanction hearing and participated therein through counsel. Appellants have not challenged this finding. Appellants were afforded the opportunity to cross-examine the witness who testified in support of the requested sanction, but they failed to do so.

Having received proper notice and the opportunity to participate, appellants were afforded due process unless the trial court's order was not rationally based on the evidence before the court at the two evidentiary hearings. As those proceedings have not been included in the record on appeal, the state appellate courts were required under Texas law to presume, and did presume, that the trial court did not commit an abuse of discretion.

The application of this principle to this case does not present a substantial federal question requiring additional

argument. Consequently the judgment appealed from should be affirmed.

CONCLUSION

For all of the reasons set out above this Court is respectfully requested to dismiss this appeal, or alternatively to affirm the judgment appealed from.

Respectfully submitted

Roy L. Barrett
of
Naman, Howell, Smith & Lee, P.C.
Texas Center
P. O. Box 1470
Waco, Texas 76703-1470
(817) 754-1421

Attorneys for Appellee
Hillcrest Baptist Hospital